

HOUSE SUBSTITUTE AMENDMENT NO. _____

for

HOUSE _____ AMENDMENT NO. _____

Offered By

AMEND Senate Substitute for Senate Committee Substitute for Senate Bill No. 114, Page 7, Section 316.150, Line 18, by inserting after all of said section and line, the following:

"407.400. As used in sections 407.400 to 407.420:

(1) "Franchise" means a written or oral arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise[, including]; "franchise" specifically includes, but is not limited to, a commercial relationship of definite duration or continuing indefinite duration, between a "wholesaler", such wholesaler being a person as defined in this section, licensed pursuant to the provisions of chapter 311 to sell at wholesale, intoxicating liquor, as defined in section 311.020, to retailers, duly licensed in this state, and a "supplier", being a person engaged in the business as a manufacturer, distiller, rectifier or out-of-state solicitor whose brands of intoxicating liquor are distributed through duly licensed wholesalers in this state, and wherein a wholesaler is granted the right to offer, sell, and distribute within this state or any designated area thereof such of the supplier's brands of intoxicating liquor, or all of them, as may be specified, with or without the grant of a license to use a trade name, trademark, service mark, or related characteristic, and whether or not there is a community of interest in the marketing of goods or services; except that, the term "franchise" shall not apply to persons engaged in sales from warehouses or like places of storage, other than wholesalers as above described, leased departments of retail stores, places of original manufacture, nor shall the term "franchise" apply to a commercial relationship that does not contemplate the establishment or maintenance of a place of business within the state of Missouri. As used herein "place of business" means a fixed, geographical location at which goods, products or services are displayed or demonstrated for sale. It is the general assembly's intent to make clear that this subdivision was correctly interpreted as set forth in the Missouri cases of High Life Sales Company v. Brown-Forman Corporation, 823 S.W. 2d 493 (Mo. 1992) and Brown-Forman Distillers Corp. v McHenry, 566 S.W. 2d 194 (Mo. 1978), rather than in Missouri Beverage Company, Inc. v. Shelton Brothers, Inc., 796 F. Supp. 2d 988 (W.D. Mo. 2011), aff'd. 11-2456 (8th Cir. February 28, 2012). Further, the general assembly declares that this subdivision was not correctly interpreted in Missouri Beverage Company, Inc. v Shelton Brothers, Inc., 796 F. Supp 2d 988 (W.D. Mo. 2011), aff'd 11-2456 (8th Cir. February 28, 2012);

(2) The term "goods" includes any personal property, real property, or any combination thereof;

(3) The term "other property" includes a franchise, license distributorship, or other similar right, privilege, or interest;

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1 (4) The term "person" includes an individual, corporation, trust, estate, partnership, unincorporated
2 association, or any other legal or commercial entity;

3 (5) The term "pyramid sales scheme" includes any plan or operation for the sale or distribution of
4 goods, services or other property wherein a person for a consideration acquires the opportunity to receive a
5 pecuniary benefit, which is not primarily contingent on the volume or quantity of goods, services, or other
6 property sold or distributed or to be sold or distributed to persons for purposes of resale to consumers, and is
7 based upon the inducement of additional persons, by himself or herself or others, regardless of number, to
8 participate in the same plan or operation; and

9 (6) The term "sale or distribution" includes the acts of leasing, renting or consigning.

10 407.413. 1. If more than one franchise for the same brand or brands of intoxicating liquor is granted
11 to different wholesalers in this state, it is a violation of sections 407.400 to 407.420 for any supplier to
12 discriminate between the wholesalers with respect to any of the terms, provisions, and conditions of these
13 franchises.

14 2. Notwithstanding the terms, provisions and conditions of any franchise, no supplier shall
15 unilaterally terminate or refuse to continue or change substantially the condition of any franchise with the
16 wholesaler unless the supplier has first established good cause for such termination, noncontinuance or
17 change. This subsection does not apply to a "supplier", being a person engaged in the business as a
18 manufacturer, distiller, rectifier, or out-of-state solicitor whose brands of intoxicating liquor are distributed
19 through duly licensed wholesalers in this state who sells less than two thousand five hundred cases of distilled
20 spirits in the state, or who sells less than ten thousand cases of wine in the state, the volume thresholds being
21 measured for the twelve months immediately preceding the date on which the wholesaler receives notice of
22 the termination, noncontinuance, or change, provided such supplier shall be obligated nevertheless, prior to
23 the effective date of the termination, noncontinuance, or change, to pay to the wholesaler an amount equal to
24 the fair market value of the distribution rights which will be lost or diminished by reason of the termination,
25 noncontinuance, or change, including without limitation the actual laid in cost of any inventory on hand, and
26 provided further that this exception shall only apply to a termination, noncontinuance or change concerning
27 the category of intoxicating liquor (namely, distilled spirits or wine) that is less than the volume threshold set
28 forth in this sentence. The exception in the preceding sentence shall not affect a supplier's obligation to
29 satisfy the notice requirements set forth in section 407.405. For purposes of this subsection, "fair market
30 value" shall be determined in accordance with the provisions of the written agreement, if any, between the
31 supplier and wholesaler, or if the written agreement between them does not specify how fair market value is
32 determined, then:

33 (1) For a supplier of wine who sells less than one thousand cases of wine in the state in the twelve
34 months immediately preceding the date on which the wholesaler receives notice of the termination,
35 noncontinuance, or change, "fair market value" shall be equal to the actual laid in cost of any inventory on
36 hand plus two times the gross profit earned by the wholesaler in the twelve month period preceding the notice
37 or twelve times the monthly average gross profit for the period of time the wholesaler served as a distributor
38 for the supplier's products if such time period is less than twelve months, and "gross profit" shall mean net
39 revenue less costs of goods sold, as calculated in accordance with generally accepted accounting principles;
40 and

41 (2) For a supplier of wine who sells at least one thousand cases but less than ten thousand cases of
42 wine in the state in the twelve months immediately preceding the date on which the wholesaler receives notice
43 of the termination, noncontinuance, or change, and for a supplier of distilled spirits that sells less than two
44 thousand five hundred cases of distilled spirits in the state in the twelve months immediately preceding the
45 date on which the wholesaler receives notice of the termination, noncompliance, or change, "fair market
46 value" shall be determined by agreement of the supplier and wholesaler, but if the parties cannot so determine

1 within thirty days after the notice, then the matter shall be submitted to mandatory arbitration before a panel of
2 three neutral arbitrators conducted pursuant to chapter 435 or the Federal Arbitration Act if the latter so
3 applies, with the parties to the arbitration each to bear their own attorneys' fees and costs of the arbitration.

4 3. Any wholesaler may bring an action in a court of competent jurisdiction against a supplier for
5 violation of any of the provisions of this section and may recover damages sustained by such wholesaler
6 together with the costs of the action and reasonable attorney's fees.

7 4. In any action brought by a wholesaler against a supplier for termination, noncontinuance or
8 substantial change in violation of the provisions of this section, it is a complete defense for the supplier to
9 prove that the termination, noncontinuance or change was done in good faith and for good cause.

10 5. As used in this section, "good faith" is the duty of each party to any franchise and all officers,
11 employees or agents thereof to act in a fair and equitable manner towards each other, and "good cause" means
12 the following:

13 (1) Failure by the wholesaler to comply substantially with the provisions of an agreement or
14 understanding with the supplier, which provisions are both essential and reasonable;

15 (2) Use of bad faith or failure to observe reasonable commercial standards of fair dealing in the trade;
16 or

17 (3) Revocation or suspension for more than thirty-one days of a beer wholesaler's federal basic permit
18 or of any state or local license required of a beer wholesaler for the normal operation of its business.

19 6. As to brewers and beer wholesalers, the provisions of this section shall only apply to agreements
20 entered into on or after August 28, 1998, and to agreements which are renewed or substantially amended on or
21 after August 28, 1998. As used in the preceding sentence, "substantially amended" means a written
22 amendment that materially alters the fundamental business relationship between brewer and wholesaler.
23 "Substantially amended" does not include changes or amendments that are contemplated in writing by the
24 parties to an agreement.

25 7. Notwithstanding any other provisions of law to the contrary, a supplier and a wholesaler of
26 intoxicating liquor may negate, modify, waive, or vary the rights granted in this chapter through a written
27 agreement between the supplier and the wholesaler."; and

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29 Further amend said bill by amending the title, enacting clause, and intersectional references accordingly.